

**ORIGINAL**

Before the  
SURFACE TRANSPORTATION BOARD



✓ Finance Docket No. 34255, 206956

PORTLAND & WESTERN RAILROAD, INC.--LEASE AND OPERATION EXEMPTION--  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Finance Docket No. 34304 -206957

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY--TRackage  
RIGHTS EXEMPTION--THE PORTLAND & WESTERN RAILROAD, INC.

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APPEAL FROM DECISION OF THE CHAIRMAN <sup>\*/</sup>

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GORDON P. MacDOUGALL  
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December 30, 2002

Attorney for John D. Fitzgerald

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\*/ Expedited handling is requested, inasmuch as consummation of  
the transaction is scheduled for 12:01 AM, Wednesday, January  
1, 2003.

Before the  
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34255

PORTLAND & WESTERN RAILROAD, INC.--LEASE AND OPERATION EXEMPTION--  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

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APPEAL FROM DECISION OF THE CHAIRMAN

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Preliminary Statement

John D. Fitzgerald,<sup>1/</sup> for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits this appeal from the decision of the Chairman, dated December 24, 2002 (served December 26), which denied the Petition for Stay of Exemptions, filed December 23, 2002, by UTU/GO-386), in both captioned proceedings. In addition to denying a stay, the Chairman directed that a redacted copy of the lease agreement between Portland & Western Railroad, Inc. (PNWR) and The Burlington Northern and Santa Fe Railway Company (BNSF), be turned over to petitioner's representative. (Decision, 12/26/02, 2 n.2).

This appeal is appropriate inasmuch as PNWR and BNSF have not consummated the transaction, and have not exercised operations

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<sup>1/</sup> General Chairman for United Transportation Union (UTU), on lines of The Burlington Northern and Santa Fe Railway Company (BNSF), with offices at 400 E. Evergreen Blvd., Vancouver, WA 98660.

under either of the two exemptions.<sup>2/</sup> Under the terms of the PNWR-BNSF lease agreement (Pet. for Stay of Exemptions, 12/23/02, Ex. 4) and the BNSF trackage rights exemption (Finance Docket No. 34304, Notice, Ex. 2), consummation cannot occur earlier than January 1, 2003. Moreover, if parties have received notice of a stay request, yet proceed with the transaction, the request for injunctive relief properly dates back to the status quo prior to the notice. For example, see: Texas & N.O.R.R. v. Northside Ry., 276 U.S. 475, 479 (1928); Porter v. Lee, 328 U.S. 246, 251 (1946); Porter v. Warner Co., 328 U.S. 395, 399 (1946).

This appeal is taken pursuant to 49 CFR 1115.2.<sup>3/</sup>

The Board should reverse the action of the Chairman, and enter a stay of the operation of the exemption in Finance Docket No. 34255; if a stay is not entered in that proceeding, a stay should be entered in Finance Docket No. 34304, to protect the Board's mandatory employee protective conditions for trackage rights. N&W Trackage, Article I, §4. (J.D. Fitzgerald, V.S., 12/23/02, 2-3, 5).

#### Background

PNWR on December 6, 2002, filed a notice of exemption, pursuant to 49 CFR 1150.41, to lease BNSF's 76.75-mile line

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<sup>2/</sup> Cf. Finance Docket No. 32392, Chicago SouthShore & South Bend Railroad--Trackage Rights Exemption--Norfolk and Western Railway Company(not printed)(served December 23, 1993).

<sup>3/</sup> The Chairman's action apparently was taken pursuant to 49 CFR 1011.5(a)(2). It may be that this pleading should be brought pursuant to 49 CFR 1115.3; if so, it would be labeled Petition for Reconsideration.

between Quinaby-Salem-Albany-Eugene, OR, with PNWR granting back trackage rights (PNWR labeling such trackage rights as "incidental") for BNSF over the line between Bush<sup>4/</sup> and Albany, a distance of 27.9 miles, with a third carrier, Central Oregon & Pacific Railroad, Inc. (CORP) accorded "incidental" trackage rights between Albany and Eugene, a distance of 45 miles.

The Chairman's decision of December 12, 2002, fixed December 27, 2002, as the earliest the exemption could become effective, in light of the required 60-days period from the October 28, 2002 submission of the Employee Notice specified by 49 CFR 1150.42(e). (Decision, 12/12/02, 2). The Decision noted a serious question exists whether the trackage rights are "incidental," in light of the fact that a "grant back" of trackage rights to the lessor and to third parties, does not come under the treatment of trackage rights as "incidental" in a lease transaction. (Decision, 12/12/-02, 2).<sup>5/</sup>

Thereafter, on December 23, 2002, PNWR withdrew the request that the proposed CORP trackage rights be approved as incidental, saying the trackage rights agreement has not been signed, but if and when the parties sign a trackage rights agreement, it will be the subject of a separate filing;<sup>6/</sup> and that although the BNSF

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<sup>4/</sup> Bush is outside Salem, OR.

<sup>5/</sup> The former ICC and the Board have determined that incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. (Decision, 12/12/02, 2).

<sup>6/</sup> The term the appears in the PNWR December 23 advice to the Board; however, the Chairman's December 24 decision speaks of its request. The PNWR-CORP trackage rights agreement is created and controlled by BNSF, not PNWR, and we believe the terms of the

trackage rights are an integral part of the transaction, in order not to delay the effectiveness of the less exemption, BNSF would file a separate exemption notice, and perhaps a motion to dismiss.

Earlier, BNSF on December 20, 2002, filed its trackage rights notice for operations between Bush and Albany, a distance of 27.9 miles, which would become effective December 27, 2002, and BNSF followed on December 23, 2002, with a motion to dismiss its Notice.<sup>7/</sup>

UTU/GO-386 on December 23, 2002, filed a petition to stay both exemptions; however, the request for stay of the BNSF trackage rights (Finance Docket No. 34304) was only in the event a stay was denied for the entire lease transaction. The basis for the stay of operation in the trackage rights proceeding is to preserve the on-going labor negotiations resulting from BNSF's service of notice under the N&W Trackage, Section 4, employee conditions, which specify a 20-days status quo period pending negotiations between the parties. See: UTU/GO-386 Pet., 12/23/02, 3-4; J.D. Fitzgerald, V.S., 12/23/02, 2-3, 5.

The various UTU/GO-386, BNSF, and PNWR pleadings were filed late in the afternoon on December 23, 2002. On the next day, December 24, 2002, the Chairman enter his decision denying a stay, which was served December 26, 2002. The Chairman reasoned that UTU/GO-386 had not shown railroad employees would suffer irreparable injury in the absence of a stay, in that if the transaction

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"highly confidential" PNWR-BNSF lease agreement will confirm the understanding given UTU/GO-386. (J.D. Fitzgerald, V.S., 12/23/02, 2).

<sup>7/</sup> UTU/GO-386 has today filed its reply to BNSF's motion.

were found subject to 49 U.S.C. 11323 governing joint use, the compensation and benefits would relate back to any harm suffered, so that it cannot be said employees would suffer irreparable harm. (Decision, 12/26,02, 2).

The Chairman added that UTU/GO-386 had not shown it is likely to prevail on the merits that a "joint use" arrangement is involved, finding that the contention is mere conjecture, absent sufficient evidence and argument. The Chairman made no findings as to injury to other parties, such as BNSF or PNWR, or wherein lies the "public interest," both of which are traditional criteria in evaluating requests for stay.

The Chairman made no findings on the stay request for Finance Docket No. 34304--BNSF's notice of exemption for its trackage rights between Bush and Albany.

#### GROUND'S FOR APPEAL

The action of the Chairman should be reversed, and a Stay entered, for the following reasons, among others:

1. New Evidence. The Chairman acted without considering the serious environmental impacts in connection with the railroad operational changes, community safety concerns, and local government concerns. These issues were raised by the State of Oregon, in its December 23, 2002 filing, but were not addressed or even mentioned by the Chairman in his Decision. (State of Oregon, 12/23/02, 4-7 indeed, the Oregon pleading was not believed to have been placed on the Board's website until after the agency had closed its doors early on December 24, 2002. These concerns

advanced by State of Oregon involve safety, train noises, and grade crossings, among other concerns, in addition to operational changes, community safety, and local government.

Railroad employees are proper parties to raise safety and environmental matters. United Transp. Union v. Surface Transp. Bd., 183 F.3d 606, 610-12 (7th Cir. 1999).

It is apparent the transaction should be stayed pending an analysis of environmental concerns. It is clear that the environment threshold of increased rail traffic and rail yard activity, specified in 49 CFR 1105.7(e)(4)(5), will be exceeded if the transaction is allowed to proceed. Cf. 49 CFR 1105.5(a)(4)(i). The Board should take immediate stay action pending resolution of environmental matters.

2. Irreparable Injury. The Chairman's finding as to lack of irreparable injury was made without reference to the BNSF trackage rights transaction. Indeed, the Chairman failed to address the request for stay of operation of the trackage rights so as to carry out the employee protective conditions of N&W Trackage with the 20-day notice requirement. The Congress has determined that the Board is to provide the minimum protection as those terms were imposed under former 49 U.S.C. 5(2)(f) and 49 U.S.C. 24706(c). See: 49 U.S.C. 11326(a), which include a 20-day notice requirement. Railway Labor Executives' Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982).

It is serious error for the Chairman to advance "lack of irreparable injury" to negate the very irreparable injury found by the Congress since 1940 to be inherent in trackage rights situations. The N&W Trackage conditions provide that consummation of

the trackage rights ordinarily may not occur until January 12, 2003, absent agreement. J.D. Fitzgerald, V.S., 12/23/02, 3.

The working of the seniority system, and quality of life standards, render employee injury truly irreparable. J.D. Fitzgerald, V.S., 12/23/02, 4, 7, App. 1) The former ICC and Board have disclaimed to be experts on railroad labor relations. For citations, see: Mahoney, William G., Interstate Commerce & the Railway Labor Act, 24 Transp. L. Journ. 241, 275-300 (1997); Investigation of Railroad Freight Service, 345 I.C.C. 1223, 1302-1303 (1976); Revision-Annual Rpt.-RR. Employees Serv.-Compensation, 1 I.C.C.2d 344, 346 n.1 (1984). The Chairman erred in overriding the will of Congress. Moreover, the loss of 40 railroad jobs, and the displacement of many others, would create a deterioration in the quality of life for many employees and their families, for which monetary damages cannot provide adequate compensation.

3. Success on Merits. UTU/GO-386 has a high probability of success on the merits. The transaction is truly a joint use agreement between PNWR and BNSF. The stations on the Quinaby-Eugene line will be both PNWR and BNSF stations; that is, a shipper routing traffic via BNSF might not be aware that PNWR would be the real carrier handling the traffic. BNSF is upgrading 20 miles of the line which will not be utilized by BNSF trackage rights. BNSF is performing this work under the PNWR-BNSF lease agreement for the benefit of PNWR's use of that part of the joint project. (J.D. Fitzgerald, V.S. 12/23/02, 5-6; Pet. for Stay, 12/23/02, 11-12). This should be a major component for finding joint use of the line.



Employees usually seek exemption revocation for the imposition of appropriate protective conditions. Such is the situation here. A joint use of the Quinaby-Salem-Albany-Eugene line requires approval of exemption under 49 U.S.C. 11323(a)(6), with mandatory employee conditions pursuant to 49 U.S.C. 11326(a). Of course, in addition to appropriate employee conditions, UTU/GO-386 has a strong stake in the operational, safety, and environmental concerns raised by State of Oregon. Revocation is necessary to address these matters--summary utilization of the class exemption is inadequate.

4. Public Interest. The Chairman's December 25, 2002 decision made reference to a series of public interest considerations, such as false and misleading information, violation of employee notice provisions, need for effective labor negotiations, inadequate discovery, and lack of opportunity to fully address the issues--leading to an opportunity to submit a petition to reject the notices and/or to revoke the exemptions. (Decision, 12/26/02, 1-2). However, except for discovery, the Chairman made no findings on these public interest matters.

UTU/GO-386 need not repeat its position on the above, for they may be found at Pet. for Stay of Exemptions, 12/23/02, 7-11.

The Chairman did address discovery, requiring PNWR to furnish an unredacted copy of the PNWR-BNSF lease agreement to UTU/GO-386's representative. (Decision, 12/26/02, 2 n.2). However, this does not resolve the inadequate discovery, for the entire multi-page lease agreement has been claimed "highly confidential" by PNWR. Accordingly, even under the chairman's discovery ruling, BNSF employees will be unable to examine any part of the agree-